Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

WILLIAM CASEY MCDONALD AND STEPHANIE MCDONALD,
INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, ET AL.

Petitioners,

v.

MARVA HAMMONS, INDIVIDUALLY AND AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES; ET AL.

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is an order appealable under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and 28 U.S.C. sec. 1291 where such order strips parents of their vital and fundamental Fifth and Fourteenth Amendment rights to direct their childrens' interests, where the order resolves a dispute separate from the merits of the case, and where the order will be effectively unreviewable on appeal from a final judgment?

II. Do parents have a Fifth and Fourteenth Amendment due process right to select counsel for their children?

III. Does a court mandated guardian *ad litem* appointment, when the very basis of a civil rights suit is to stop state interference in a parent/child relationship, violate the parents' right to privacy and to raise their children free from government interference?

LIST OF PARTIES

Petitioners

WILLIAM CASEY MCDONALD AND **STEPHANIE MCDONALD,** INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN

JOANNA MCDONALD, NICHOLAS MCDONALD, BRENDAN MCDONALD AND **EMILY MCDONALD,**

AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondents

MARVA HAMMONS, INDIVIDUALLY AND AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES

KATHRYN CROFT, INDIVIDUALLY AND AS DEPUTY COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES

WILLIAM J. BRATTON, INDIVIDUALLY AND AS COMMISSIONER, NEW YORK POLICE DEPARTMENT

RAYMOND MARCHESE, INDIVIDUALLY AND AS SERGEANT, NEW YORK POLICE DEPARTMENT

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JOAN SMITH, INDIVIDUALLY AND AS CASEWORKER, CHILD WELFARE ADMINISTRATION

ROLANDO ROMAN, INDIVIDUALLY AND AS SUPERVISOR, CHILD WELFARE ADMINISTRATION

VALENTINE C. DIKE, INDIVIDUALLY AND AS CASEWORKER, CHILD WELFARE ADMINISTRATION

CITY OF NEW YORK

SUP. CT. RULE 29.6 STATEMENT

Petitioners do not have any corporate affiliations. THE RUTHERFORD INSTITUTE, ("TRI"), is a *pro bono* civil rights organization which faciliates the representation of Petitioners and other persons on free speech, religious rights and other civil rights issues. TRI does not have any parent company or subsidiaries, but is a nonprofit corporation.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, ("McDonalds") respectfully petition this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The unreported decision of the Second Circuit, rendered on November 10, 1997, is attached in the Appendix to this petition. ("Pet. App.") The reported decision of the United States District Court for the Eastern District of New York can be found as *McDonald v. Hammons,* 936 F. Supp. 86 (E.D.N.Y. 1996). Said opinion was rendered on September 11, 1996 and is attached in the Appendix. An unreported decision from the United States District Court for the Southern District of New York was rendered on March 18, 1997 and is attached.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was rendered on November 10, 1997. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. sec. 1254 and/or 28 U.S.C. sec. 1291 and/or Sup. Ct. Rule 10.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

A) The following constitutional amendments are relevant to this case, and are set forth in the Appendix hereto.

Vth Amendment, U.S. Constitution, Due Process Clause
VIth Amendment, U.S. Constitution, Right to Counsel Clause
XIVth Amendment, U.S. Constitution, Due Process Clause

B) The following statute is relevant to this case, and is set forth in the Appendix hereto.

28 U.S.C. sec. 1291.

C) The following rule of civil procedure is relevant to this case, and is set forth in the Appendix hereto.

Fed. R. Civ. P. 17(c).

STATEMENT OF THE CASE

A. Statement of the Facts

An anonymous caller phoned New York City's Emergency Children Services Unit on September 23, 1994, claiming that the four minor children of Casey and Stephanie McDonald had poor hygiene, that two of them were bruised, and that Stephanie McDonald had been seen spanking one of them. *McDonald,* 936 F.Supp. at 87. Two caseworkers arrived at the McDonalds' apartment at approximately 9:45 that night. Mr. McDonald spoke with the caseworkers in the lobby of the building, but would not permit them entry to the apartment. The caseworkers called for police assistance, and several police officers, two Emergency Services vehicles, and some men in black SWAT uniforms wearing padded vests came to the scene. Mr. McDonald brought his four children, then aged 8 years, 6 years, 4 years, and 9 months, to the lobby to be observed by the caseworkers. Mr. McDonald refused to allow the caseworkers to strip search the children or enter the apartment.

Two days later, another caseworker returned to the McDonalds and demanded to be admitted to the apartment. The McDonalds again refused admittance. To protect the children, Mrs. McDonald fled the apartment and remained in hiding until a district court judge issued a temporary restraining order prohibitting the government agents from making surprise searches of the McDonalds' home and/or seizing the children. (See Appendix to the Second Circuit, at 56).

B. Proceedings and Decisions in the Courts Below

The editor's note to *McDonald v. Hammonds,* 936 F. Supp. 86 (E.D.N.Y. 1996) gives an excellent thumb-nail sketch of the procedure of this case. The editor states:

> Parents, who were anonymously accused of child abuse, sued city, social services and police departments and various departmental officials and employees. Defendants moved to disqualify parents' counsel from representing minor children. Motion was denied but Azrack, United States Magistrate Judge, recognized potential conflict and assigned guardian ad litem for deposition purposes. Parents objected. The District Court, Korman, J., held that: (1) potential for conflict might preclude multiple representation, and (2) appointment of guardian was proper.

McDonald, 936 F. Supp. at 86 at editor's note. Several points are important from the lower court decisions.

The key point regarding the alleged child abuse, which was the underlying charge that led to this 42 U.S.C. sec. 1983 action, was unfounded as shown by the fact that representatives of Respondent, New York Social Services, physically examined Petitioner children finding no child abuse. *McDonald,* 936 F. Supp. at 87, column one. *See also, McDonald,* 2nd Cir. Op. at page 2, Pet. App. A-18. Ignoring the fact that the initial investigation proved the anonymous tip of child abuse to be false, Respondents continued to harass Petitioners; eventually forcing Petitioners to flee their home to avoid further contact with Respondents.

Id.

This petition arises from the fact that Respondents moved to disqualify Petitioners' counsel due to an alleged potential conflict of interest between Petitioner-parents and Petitioner-children. *McDonald,* 936 F. Supp. 87, column 2. The U.S. Magistrate Judge denied the Respondents' motion to disqualify Petitioners' counsel yet ordered separate counsel for the children anyway. *Id.* The U.S. District Court stated the following:

> While Plaintiffs [Petitioners] may be correct in arguing that there is "absolutely no conflict" between the parents and their infant children, this is a case in which, on the current record, there is a potential conflict of interest.

McDonald, 936 F. Supp. at 87. The District Court goes on to note that a potential conflict of interest may eventually become an actual conflict of interest which would then bar joint representation of Petitioner-parents and Petitioner-children by a single attorney. *McDonald,* 936 F. Supp. at 87-88. The District Court upheld the U.S. Magistrate Judge's denial of the motion to disqualify counsel, but allowed counsel for the children to be appointed for limited purposes. *McDonald,* 936 F. Supp. at 89.

The Second Circuit, relying upon *Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424 (1985) and *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368 (1981), found Petitioners' claims are not final judgments and thus not appealable. *McDonald,* 2nd Cir. Op. at page 3, Pet. App. A-20. The Second Circuit rejected Petitioners' claim that this matter falls into the exception to 28 U.S.C. sec.. 1291

pursuant to *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) and/or *Swint v. Chambers County Comm'n*, 514 U.S. 35, 115 S. Ct. 1203, 1208 (1995). *McDonald*, 2nd Cir. Op. at page 3, Pet. App. A-20. The Second Circuit dismissed this matter for lack of appellate jurisdiction. *Id.*

The general rule of construction for this, and other, 28 U.S.C. 1291 claims can be found in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), (a/k/a "*Eisen IV*"). *Eisen IV* states:

> ...the requirement of finality is to be given a "practical rather than a technical construction" "...The inquiry requires some evaluation of the competing considerations...the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."

Eisen IV, 417 U.S. at 171. When considering the practical effect of the *Cohen* doctrine[1], 28 U.S.C. sec. 1291 should be given a liberal construction. *See U.S. v. Cefaratti*, 202 F.2d 13, 15 (D.C. Cir. 1952).[2]

The gist of Petitioners' complaint is that they sued Respondents in federal court to stop the state from unfounded and unjustified bureaucratic interference with the Petitioners' parent-child relationship. When Petitioners sought relief in federal court, the State asked the federal court to engage in

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[1] *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

[2] Criticized by this Court on other grounds, but not criticized on this logic. *See Carroll v. U.S.*, 354 U.S. 394, 414 (1956).

the exact same type of "big brother" interference which Petitioners were suing to stop the state from doing. While acknowledging that the original child abuse complaint against Petitioner-parents was "unfounded", and that "Plaintiffs may be absolutely correct in arguing that there is 'absolutely no conflict' between the parents and their infant children"; the courts appointed counsel for the children anyway. *See McDonald,* 2nd Cir. Op. at 2, Pet. App. at A-16 and *McDonald,* 936 F. Supp. at 887. Petitioners appeal this ruling because Petitioners' wish to keep bureaucratic interference out of Petitioner's home becomes a moot point if a guardian ad litem is appointed. The true irony of this whole case is that the District Court denied Respondent's motion to disqualify Petitioners' counsel; then the court ordered separate counsel for Petitioners anyway. Thus the District Court ordered a de facto disqualification of Petitioners' counsel. *McDonald,* 936 F. Supp. at 86, column 2.

Petitioners seek certiorari from this Honorable Court.

REASONS FOR GRANTING THE WRIT

ISSUE I: **An order is appealable under *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949) and 28 U.S.C. sec. 1291 where such order strips parents of their vital and fundamental Fifth and Fourteenth Amendment rights to direct their childrens' interests, where the order resolves a dispute separate from the merits of the case, and where the order will be effectively unreviewable on appeal from a final judgment.**

28 U.S.C. sec. 1291 grants that the United States Courts of Appeals jurisdiction over "all final decisions of the district courts of the United States". "The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete...Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). *Cohen,* however, created an exception to the general rule that non-final decisions are not reviewable by the courts of appeals. This Court, in Cohen, noted that there are some decisions, "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen,* 337 U.S. at 546. This exception is commonly called the "collateral rule" doctrine.

The decision of a district court judge to disqualify an attorney representing one of the parties in a civil case is not a final decision as set forth in 28 U.S.C. sec. 1291. *Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424, 430 (1985). Therefore, in order to appeal such a decision, the decision must fall into the "collateral" exception to the statute. In 1985, the United States Supreme Court held that attorney disqualification orders in civil cases do not meet the "collateral rule" exception. *See Koller,* 472 U.S. 424 (1985). Prior to this Court's decision in Koller, the courts of appeals had been split on this issue.

Before *Koller,* courts of appeals distinguished disqualification of counsel decisions by district court judges into two categories: orders refusing to disqualify counsel and orders disqualifying counsel. Most courts agreed that orders

refusing to disqualify counsel in civil cases were not immediately appealable. *See Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368. The courts of appeals were split, however, on the issue of whether a decision to disqualify counsel in a civil case was immediately reviewable. Compare *Gibbs v. Paluk,* 742 F.2d 181 (5th Cir. 1984) (denying appeal until final adjudication); *Kahle v. Oppenheimer & Co.,* 748 F.2d 337 (6th Cir. 1984) (same) with *Banque de Rive v. Highland Beach Development Corp.,* 758 F.2d 559 (11th Cir. 1985) (allowing immediate appeal); *Interco Systems, Inc. v. Omni Corp. Serv. Inc.,* 733 F.2d 253 (2nd Cir. 1984) (same).

This Court clarified the exception by adopting a test for determining when a non-final decision could be reviewed. In *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978), the Court said that in order for a decision to fall under the collateral rule, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment". This is precisely Petitioners' predicament. In determining that an order disqualifying counsel in a civil case was not reviewable, the *Koller* Court held that the second and third prongs of the *Coopers & Lybrand* test were not met. The *Koller* Court was unpersuaded by the argument that if a party were forced to appeal the decision to disqualify counsel only after a final adjudication of the merits it would be nearly impossible to prove prejudice on appeal. *Koller,* 472 U.S. at 438. The Court also went on to state that, "[e]ven if some orders disqualifying counsel are separable from the merits of the litigation (as required by the second prong of the *Coopers & Lybrand* decision), many are not." *Koller,* 472 U.S. at 439.

However, an order requiring children to be examined by a government-appointed official - against the will of their parents and without their parents present at the examination - is not a simple case of disqualifying counsel. A recent decision from the Eleventh Circuit makes clear that the holding in Koller is not an absolute rule preventing appellate review of attorney disqualification orders in cases relating to minors. *See Devine v. Indian River County School Board,* 121 F.3d 576 (11th Cir. 1997). In *Devine,* a district court judge in Florida refused to allow William Devine to discharge his lawyer and proceed *pro se* on behalf of his minor son. In determining that the district judge's decision was properly reviewable under the "collateral rule" exception the court applied the three prong test set forth under *Coopers & Lybrand. Devine,* 121 F.3d at 579-80. The Eleventh Circuit also looked at a litany of prior decisions allowing appellate review of decisions denying a litigant *pro se* status. *Devine,* 121 F.3d at 579. Applying the third prong of the *Coopers & Lybrand* test, the Eleventh Circuit held that the decision to deny a party the right to proceed *pro se* could not properly be corrected upon an appeal on a judgment after final adjudication of the merits. The court felt that not allowing immediate appeal would have the potential effect of barring potential litigants from prosecuting their cases. *Devine,* 121 F.3d at 581.

The facts in the present litigation are directly analogous to the facts in *Devine*. By denying Petitioner-parents the ability to choose counsel for their children, the court in effect bars the children from bringing their claims. Because the minor children lack standing to proceed *pro se* on their own behalf, their rights to an appeal after the merits of the case have been adjudicated will not properly be protected by a court appointed lawyer. Likewise, requiring Petitioner-parents to wait until the merits of the litigation

have been adjudicated would effectively prevent them from acting on behalf of their children's best interest. Petitioners cannot be forced to choose between forgoing their legal claims or forgoing their fundamental rights to family privacy and self-determination. The facade of a potential conflict due to potential child abuse flies directly into the face of the fact that the original charge was unfounded. *McDonald,* 2nd Cir. Op. at 2. Pet. App. A-18. The Second Circuit erred in applying the Koller decision in this case. A parent has a fundamental right to rear their children without unnecessary interference from the government. "Historically, our society has attached great importance to the notion of family privacy". Soler, et al., *Representing the Child Client*, sec. 3.01 at page 3-4 (Matthew-Bender, 1993). Regardless of the good intentions of the Second Circuit, their decision circumvents this fundamental Due Process right. "Where due process comes into conflict with procedures in the juvenile courts [or cases]-however laudable the purpose behind the adoption of the procedures-due process must prevail". *Arwood v. State,* 463 S.W.2d 943, 946 (Tenn. App. E.S. 1970). Certiorari is the only avenue left to protect Petitioners' Vth and XIVth Amendment Due Process right to the parent-child relationship anticipated in Fed. R. Civ. P. 17(c). Certiorari is justified under Sup. Ct. Rule 10(a) and (c).

ISSUE II: Parents have a Fifth and Fourteenth Amendment due process right to select counsel for their children.

The District Court unconstitutionally appointed a guardian ad litem to represent the Petitioner-children. Actually, a guardian ad litem's job is to be a "watch dog" figure, not the lawyer for the Petitioner' children. *See McCaslin by McCaslin v. Radcliff,* 168 F.R.D. 249, 256 (D. Neb. 1996). Therefore,

forcing the Petitioner-children to appear before the U.S. Magistrate Judge only with the guardian ad litem mandated that said Petitioner-children were proceeding *pro se* in that part of litigation. This is contrary to the acknowledged right of a 42 U.S.C. sec. 1983 litigant to proceed via an attorney. *See Davis v. Stamler,* 650 F.2d 477, 480 (3rd Cir. 1981) and *Hodge v. Police Officers,* 802 F.2d 58, 61 (2nd Cir. 1986). The appointment of a guardian ad litem was unconstitutional because it intruded upon family rights of both the parents and the children. The Second Circuit Court of Appeals did not directly or adequately address the issue of whether the appointment of a guardian ad litem violated the United States Constitution. Now, Petitioners ask this Honorable Court to grant this petition of writ of certiorari so that the constitutionality of this issue may be properly addressed under the Vth, VIth and XIVth Amendments.

This Honorable Court has said that the right to counsel includes the qualified right to counsel of one's choice. *Wheat v. U.S.,* 486 U.S. 153, 162-163 (1988). The Petitioner-children are not asking for new counsel. The motion to have a guardian ad litem appointed originated from the state which has been referred to as having "coercive interference" powers. *Robison v. Via,* 821 F.2d 913, 920 (2nd Cir. 1987). The children themselves are not asking for new counsel. Therefore, appointing a guardian would be violating the children's Vth and VIth Amendment constitutional right to have counsel of their own choice. The lower courts should presume that parents have the best interest of their children at heart, as Fed. R. Civ. P. 17(c) assumes. *See U.S. v. Noble,* 269 F. Supp. 814, 816 (E.D.N.Y. 1967). In absence of a request by the minors to have the court appoint new counsel, the state must show an actual conflict between the parents and the minors to justify the court invading the family's right to privacy. The

Petitioner-children may waive constitutional or statutory rights if said waiver is knowing and voluntary. "Antieua", *Modern Constitutional Law,* sec. 6:13 at page 466 (Lawyers Co-Op, 1969).

Where actual conflict of interest exists, a person's desire for a particular counsel can be denied. *Cuyler v. Sullivan,* 446 U.S. 335, 349-350 (1980). For the court to *de facto* disqualify Petitioners' attorney, the Respondents must show evidence of an actual conflict. *See generally, Santosky v. Kramer,* 455 U.S. 745, 760 (1982). The Respondents have not shown any conflict. On the contrary, Respondents found the potential conflict in this case to be "unfounded". *McDonald,* 2nd Cir. Op. at 2 Pet. App. A-18. The State has alleged that the Petitioner parents possibly abused their children. The State contends that the alleged child abuse is somehow a sufficient basis for disqualifying the attorney for the children. The State's argument fails because the Vth and XIVth Amendment Due Process Clauses protect a minor's right to choose their own counsel, or to have their parent choose their counsel for them. Accord, Fed. R. Civ. P. 17(c). The State must do more than simply allege that a possible conflict could exist to circumvent this right. *See Thomas v. New York City,* 814 F. Supp. 1139 (E.D.N.Y. 1993). The charges of child abuse have already been investigated by Respondents and declared "unfounded". *McDonald,* 2nd Cir. Op. at 2. Pet. App. A-18. Therefore, the Second Circuit Court of Appeals is violating the children's constitutional right to counsel of their choice under the Vth and VIth Amendments by disqualifying Petitioner's attorney without showing an actual conflict.

Petitioners ask this Honorable Court to adopt the Fifth Circuit's disqualification of counsel standard as a constitutional rule. The Fifth Circuit held that the mere fact

of joint representation will not be sufficient to show an actual conflict. The Fifth Circuit further opined that mere speculation and hypothesis regarding a potential conflict will not form the basis of disqualifying counsel. *U.S. v. Medel,* 592 F.2d 1305, 1310 (5th Cir. 1979). It is improper for opposing counsel to request disqualification of the children's counsel without showing an actual conflict between the Petitioner-parents and Petitioner-children. The right to privacy found in *Griswold v. Connecticut,* 381 U.S. 479, 485 (1965) should include the right to allow parents who have not harmed their children to hire any attorney they please to represent said children without state approval. When the state is being sued, the state will be encouraged to manufacture potential conflicts to drive up Plaintiff costs and avoid the most skilled attorneys. This is dangerous precedent which should be reviewed under Sup. Ct. Rule 10(a) and (c).

ISSUE III: A court mandated guardian ad litem appointment, when the very basis of a civil rights suit is to stop state interference in a parent/child relationship, violates the parents' right to privacy and to raise their children free from government interference.

Fed. R. Civ. P. 17(c) states that "[t]he court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person". Fed. R. Civ. P. 17(c) (emphasis added). Usually, it is the parent of the infant who is responsible for providing the proper guidance and protection for their minor children as "next friend". If a court of law assume that responsibility, then the court is actually declaring the parent unable to properly care for the child's best interests. Such a declaration demands careful scrutiny, as the

right to rear children is a fundamental right. *See e.g., Doe v. Norris,* 751 S.W.2d 831, 841 (Tenn. 1988).

The family is regarded as by this Court as an institution "deeply rooted in this Nation's history and tradition". *Moore v. East Cleveland,* 431 U.S. 494, 503 (1977). As such, this Court has consistently recognized the right of the family to be free of unwarranted intrusion and interference by the government. *See M.L.B. v. S.L.J.,* ____ U.S. _____, 117 S. Ct. 555, 563 (1996) (stating that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the XIVth Amendment against the State's unwarranted usurpation, disregard, or disrespect) (quoting *Boddie v. Connecticut,* 401 U.S. 371, 376 (1971); *Santosky v. Kramer,* 455 U.S. 745, 753 (1982) (acknowledging that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the XIVth Amendment"); and *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-640 (1974) (arguing that "[t]his Court has long recognized that freedom of personal choice in matters of...family life is one of the liberties protected by the Due Process Clause of the XIVth Amendment").

One of the main reasons behind this Honorable Court's willingness to protect the family from intrusion by the government is a concern for the children. According to this Court, "the rights of the parents are a counterpart of the responsibilities they have assumed". *Lehr v. Robertson,* 463 U.S. 248, 257 (1983). These responsibilities would, of course, include looking out for the best interests of the children in every realm, including the legal realm. As Justice Brennan explained, "when parents make a commitment to meet those responsibilities, the child has a right to rely on the

unique contribution of each parent to material and emotional support". *Bowen v. Gilliard,* 483 U.S. 587, 612-13 (Brennan, J., dissenting) (1987). Therefore, "the child...has a fundamental interest in the continuation of parental care and support, and a right to be free of governmental action that would jeopardize it". *Bowen,* 483 U.S. at 613 (Brennan, J., dissenting). Steam-rolling a *de facto* disqualification of Petitioners' attorney, over Petitioners' objection, on the potential fact of a possible actual conflict of interest is thin grounds for interfering with the fundamental Due Process rights of Petitioners. When said factual basis has been previously explored and the "potential" conflict was "unfounded", the basis for the disqualification is ridiculous. This Court needs to provide guidance in this area as discussed in Sup. Ct. Rule 10(a) and (c).

This Court has long recognized and respected a "private realm of family life which the state cannot enter". *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). *See also, Wisconsin v. Yoder,* 406 U.S. 205, 232 (1972) (stating that "the primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Pierce v. Society of Sisters,* 268 U.S. 510, 555 (1925) (stating that "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"); *Meyer v. Nebraska,* 262 U.S. 390 (1923) (declaring as unconstitutional a Nebraska statute that effectively banned foreigners from having their children educated in a parochial school according to their native tongue). The importance that this Court has placed on protecting the "private realm" of individual families from intrusion by the government can be illustrated very well by the Court's stance on religion in the public schools. Noting that the government's dangerous capability of intrusive or

coercive behavior is almost always an issue when the government involves itself with areas of life traditionally held by the parent (like education and upbringing), this Court has made a concerted effort to severely limit governmental influence into such familial areas. *See Edwards v. Aguillard,* 482 U.S. 578, 584 (1987) (emphasizing the great "coercive power" inherent in the state when the state imposes requirements on children that are "involuntary"); *Grand Rapids School Dist. v. Ball,* 473 U.S. 373, 383 (1985) (acknowledging the "sensitive relationship between government and religion in the education of our children" and that "[t]he government's activities in this area can have a magnified impact on impressionable young minds") overruled on other grounds by *Agostini v. Felton,* _____U.S._____, 117 S. Ct. 1997 (1997); *Wallace v. Jaffree,* 472 U.S. 28, 60 (1985) (holding that even a time of meditation in a public school where students may choose to pray or not to pray is impermissibly coercive); *School District of Abington Township v. Schempp,* 374 U.S. 203, 223 (1963) (striking down as unconstitutional a public school practice of daily Bible reading due to its involuntary, coercive nature); *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642 (1943) (holding that forcing children who come from a family of Jehovah's Witnesses to salute the flag and say the pledge of allegiance is unconstitutional governmental coercion); *Pierce v. Society of Sisters,* 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923). Parents who have done no wrong to their children have a fundamental right to protect the interests of their children. President Kennedy once said, "A child miseducated is a child lost". Peter, Peter's Quotations, *"Education"* 173 (Morrow 1977). What will Petitioner-children learn if certiorari is denied in this case? Certiorari should be granted pursuant to Sup. Ct. Rule 10(a) and (c).

In light of the many decisions from this Court that support a careful scrutiny of any governmental interference with familial rights of parents to care for their children, the present action by the government in appointing a guardian ad litem to children who already have a guardian, their parents, should be reversed. *See M.L.B. V. S.L.J.*, ____U.S.____, 117 S. Ct. 555, 563-64 (1996) (stating that in the domain of cases "involving state controls or intrusions on family relationships," in order to "guard against undue official intrusion, the Court has examined closely and contextually the importance of the governmental interest advanced in defense of the intrusion"). If there was a problem of child abuse, which is the alleged basis for the de facto disqualification of counsel, the charge would not have been declared "unfounded" and dismissed after investigation. *McDonald,* 2nd Cir. Op. at 2. Pet. App. A-18. Even if the children had suffered abuse, that would be irrelevant to the claims being litigated in this case. Whether the Respondents did or did not violate Petitioners rights in conducting their investigation turns on their actions and the information and knowledge they had at the time of the investigation. The state cannot now, under the guise of civil discovery, reopen a child abuse investigation that was already concluded in favor of the parents, and the result of which is irrelevant to the issues of this case. *Certiorari* is justified and should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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DATED: February 9, 1998.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION
AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebelllion, shall not be questioned. But

neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE ANNOTATED TITLE 28, SECTION 1291

§ 1291. Final decisions of district courts. The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

UNITED STATES CODE ANNOTATED FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS RULE 17 PART (c)

Rule 17. Parties Plaintiff and Defendant; Capacity. (c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent

person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shlall make such other order as it deems proper for the protection of the infant or incompetent person.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

WILLIAM CASEY MCDONALD and STEPHANIE MCDONALD, individually and on behalf of their minor children JOANNA MCDONALD, NICHOLAS MCDONALD, BRENDAN MCDONALD, and EMILY MCDONALD, and on behalf of all others similarly situated,

Plaintiffs,

MEMORANDUM
- against - AND ORDER

MARVA HAMMONS, ET AL., 94 CV 4654 (ERK)

Defendants.
----------X

Korman, J.

The accusation of child abuse at the center of this case was made on September 23, 1994, in an anonymous telephone call to New York City's Emergency Children Services Unit. The caller stated that the children of plaintiffs William Casey McDonald and Stephanie McDonald suffered from poor hygiene, that two had bruises, and that their mother had been seen hitting one of them. In accordance with New York State and City laws requiring that investigations into allegations of child abuse commence within twenty-four hours of a report, see New York Social Services Law §424(5); N.Y. Comp. Codes R. & Regs. tit. 18 §, 432.2(b)(3)(i), two caseworkers were

dispatched to plaintiffs' apartment at approximately 9:45 pm that night. Mr. McDonald agreed to talk with them in the lobby of the building but refused to permit the caseworkers to enter the apartment. The caseworkers then summoned police assistance. See Amended Complaint ¶ 32.

After several police officers had arrived on the scene and engaged Mr. McDonald in a tense exchange, Mr. McDonald brought his children to the lobby of the building and permitted the caseworkers to observe them, but did not allow the children to answer questions. When Mr. McDonald continued to deny requests for access to the apartment, the assembled caseworkers and police eventually left the scene. Two days later a new caseworker and supervisor were assigned to continue the investigation. In response to their renewed demands to enter the apartment, Mrs. McDonald fled the paartment with the children and remained in hiding for approximately one week until the parties stipulated that defendants would take no further action with respect to the reported abuse without advance notice to plaintiffs.

As a result of the foregoing events, plaintiffs William Casey McDonald and Stephanie McDonald and their four minor children have filed this action pursuant to 42 U.S.C. § 1983 against the City of New York, its Social Services and Police Departments, and various officials and employees in those Departments. Plaintiffs contend that "defendants conducted a grossly insufficient and unprofessional investigation" and that "[a]t all times, the city defendants lacked and continue to lack probable cause to remove or detain plaintiffs' children, to search plaintiffs' home, to commence child protective proceedings against plaintiffs, and/or to arrest plaintiffs." Amended Complaint

§ 51, 53. Plaintiffs complain that they suffered a variety of harms as a result of the investigation, including loss of privacy, loss of liberty, loss of fatherly care, "extreme humiliation, pain and suffering, terror, mental anguish, and depression." Id. ¶ 74. They seek five million dollars in actual damages, as well as punitive damages, attorney fees and various forms of injunctive relief.

During the course of litigation, defendants moved to disqualify plaintiffs' counsel from representing the minor children. Although she denied the motion to disqualify, United States Magistrate Judge Azrack agreed with defendants that there weas a potential conflict between the parents' interest in maintaining that they have never abused their children and the children's interest in reporting any abuse, if in fact any abuse had occurred. As a practical matter, this conflict might lead the parents to attempt to influence their children to testify falsely at their respective depositions. To address this problem, Magistrate Judge Azrack directed that "a guardian ad litem be appointed for purposes of the preparation of the children for the deposition and the deposition." Tr. of Proceedings Before Judge Azrack, Jun. 30, 1996, at 3.

While plaintiffs may be correct in arguing that there is "absolutely no conflict" between the parents and their infant children, this is a case in which, on the current record, there is a potential conflict of interest. This conflict is posed by the fact that the children are being represented by counsel selected and retained by their parents in a case in which the parents' treatment of their children provides the central backdrop. If the children confided in their attorneys that they had been abused, neglected, or otherwise mistreated, their obligation to effectively represent the interests of the children testify

truthfully, would require them to advise the children to disclose the abuse, or to take steps to permit disclosure, in order to protect the children from further abuse. This course of action by the attorneys would conflict with the interests of the parents who retained them. Moreover, aside from the potential conflict, if the children have been abused they may not feel comfortable discussing it openly with counsel retained by their parents.

The foregoing discussion is based on the assumption that there is some truth to the claim that the children were neglected or abused. While that remains to be proven, it is sufficient for present purposes to acknowledge the potential for conflict implicit in this relationship. The problem of multiple representation presented here, and the imperative to proceed with caution, is well recognized by the ABA's Model Code of Professional Responsibility, which adopts the following approach:

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse

employment initially.

ABA Model Code of Professional Responsibility, Ethical Consideration 5-15 (emphasis added). Even where representation of multiple parties to the same lawsuit is appropriate,

> it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should eexplain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

Ethical Consideration 5-16.

This is not a case in which the normal safeguards can be applied because the children are not competent to determine whether their potential conflict with their parents precludes joint representation. Nor are they competent to "waive" the conflict. As a result, someone else must act on behalf of the children with respect to this issue. Although normally, a parent could exercise this authority, federal courts "have repeatedly affirmed a court's power to determine that the interests of a child or incompetent will be best represented by a 'next friend' or guardian ad litem and not by an authorized representative such as a parent or general guardian." Ad Hoc Comm. of Concerned Teachers v. Greenburgh #11 Union Free Sch. Dist., 873 F.2d 25, 30

(2d Cir. 1989); see also Hoffert v. General Motors Corp., 656 F.2d 161, 164 (5th Cir. 1981), cert. denied, 456 U.S. 961 (1982). Appointment of a guardian for an infant is justified when a parent "is unable, unwilling or refuses to act, or has interests which conflict with that of the infant." Ad Hoc Comm. of Concerned Teachers, 873 F.2d at 30 (emphasis added).

Evidently seeking to minimize the intrusiveness of the guardian's participation, Magistrate Judge Azrack limited the guardian's role to preparing the children for depositions and representing them at their depositions. Under this approach, the depositions would be the forum at which the facts relating to a conflict would be brought out. In my opinion, the better approach would be to separate the conflict determination from the substance of the litigation. The appointment by Magistrate Judge Azrack of a guardian who would have an opportunity to meet and speak with the children, together with appropriate assistance and inquiry from the Magistrate Judge, may address the concerns voiced by her without interfering with the parents' choice of counsel at the formal stages of a case in which there may not be persuasive evidence of neglect or abuse.

Because it is not possible to foresee what the result of the foregoing procedure will be, it is neither necessary or appropriate to propose contingent courses of action that the Magistrate Judge may wish to follow. Nevertheless, I do not intend to sugest that she would be precluded from adhering to her original decision if the record provides a basis for concluding that the children should be separately represented at the deposition. Before such action is taken at the behest of the defendants, less intrusive measures should be pursued.

Accordingly, the order of the Magistrate Judge is modified with instructions to conduct further proceedings consistent with this opinion.

SO ORDERED

[Sigature]

Edward R. Korman
United States District Judge

Dated: Brooklyn, New York
September 11, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

WILLIAM CASEY MCDONALD and STEPHANIE MCDONALD, individually and on behalf of their minor children JOANNA MCDONALD, NICHOLAS MCDONALD, BRENDAN MCDONALD, and EMILY MCDONALD, and on behalf of all others similarly situated,

ORDER

94-CV-4564 (NG)

Plaintiffs,

- against -

MARVA HAMMONS, ET AL., 94 CV 4654 (ERK)

Defendants.
----------X

A P P E A R A N C E S:

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BY: ISAAC KLEPFISH OF COUNSEL

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AZRACK, United States Magistrate Judge:

By order dated September 11, 1996, the Honorable Edward R. Korman, United States District Judge referred this action to the undersigned to appoint a guardian ad litem for the minor plaintiffs in this case for purposes of conducting an inquiry into whether the minor plaintiffs require legal counsel separate from the attorney who represents their parents. (Since that time, this case has been reassigned to the Honorable Nina Garshon.) I hereby appoint Bonnie Rabin, Esq., of Cohen, Hennessey & Blenstock, 605 Third Avenue, 25th Floor, New York, New York 10158 to serve as guardian ad litem for that purpose.

Dated: Brooklyn, New York
November 25, 1996

[Signature]

JOAN M. AZRACK
UNITED STATES
MAGISTRATE JUDGE

ORDER

WILLIAM CASE McDONALD, et al. v. **MARVA HAMMONDS,** et al.,
94 CV 4654 (NG) (JA)

On June 20, 1996 Magistrate Judge Azrack issued an oral directive that a guardian ad litem be appointed in this action because of the potential for conflict between the interests of the minor plaintiffs and their parents. The plaintiffs appealed this directive to District Judge Korman, to whom this case was then assigned. By Order dated September 11, 1996, Judge Korman affirmed the directive that a guardian ad litem be appointed while limiting the scope of the letter's duties to the conduct of an investigation into whether the minor plaintiffs require legal counsel separate from the attorneys retained by their parents. On November 25, 1996, consistent with Judge Korman's order, Magistrate Judge Azrack issued an order appointing Bonnie Rabin, Esq. as guardian ad litem. The plaintiffs have now appealed this ruling.

As defendants correctly argue, plaintiffs' appeal of the November 25, 1996 order is merely an effort to relitigate before me an issue upon which Judge Korman has already ruled, i.e., whether a guardian ad litem should be appointed in this action. The November 25, 1996 order does nothing but carry out Judge Korman's ruling on that issue by appointing Ms. Rabin as guardian ad litem. The plaintiffs do not make any argument here as to Ms. Rabin's capacity to fulfill the role of guardian ad litem; they only seek to have me reconsider their arguments that *no* guardian ad litem be appointed in this action. Accordingly, I hereby affirm Magistrate Judge Azrack's order of November 25, 1996.

SO ORDERED,

[Signature]
NINA GERSHON
United States District Judge

Dated: Brooklyn, New York
March 18, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on [unreadable] the day of November, one thousand nine hundred and ninety-seven.

PRESENT:
HON. JON O. NEWMAN,
HON. FRANK X. ALTIMARI,
HON. GUIDO CALABRESI.
Circuit Judges. [Filed: Nov. 10, 1997]

WILLIAM CASEY MCDONALD and STEPHANIE MCDONALD, individually and on behalf of their minor children JOANNA MCDONALD, NICHOLAS MCDONALD, BRENDAN MCDONALD, and EMILY MCDONALD, and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

MARVA HAMMONS, individually and as Commissioner of the New York City Department of Social Services; KATHRYN CROFT, individually and as Deputy Commissioner of the New York City Department of Social Services; WILLIAM J. BRATTON, individually and as Commissioner, New York Police Department; RAYMOND MARCHESE, individually and as sergeant, New York Police Department; TONIA WATSON, individually and as caseworker, Child Welfare Administration; ROLAND ROMAN, individually and as supervisor, Child Welfare Administration; JOAN SMITH, individually and as caseworker, Child Welfare Administration, and City of New York,

Defendants-Appellees.

Appearing for Plaintiffs-Appellants:
CAROLYN A. KUBITSCHEK, New York, New York.

Appearing for Defendants-Appellees:
GEORGE GUTWIRTH, New York, New York.

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Southern District of New York (Nina Gershon, *J.*), it is hereby

ORDERED, ADJUDGED, AND DECREED that the appeal be and it hereby is DISMISSED.

I. Background

The plaintiffs, William and Stephanie McDonald (the "McDonald parents") and their children, brought a putative

class action, pursuant to 42 U.S.C. § 1983, against various officials in the New York City Department of Social Services, Child Welfare Administration, and Police Department. Their claims arose out of the defendants' investigation of an anonymous telephone call reporting that the McDonald children were being abused or neglected. After the defendants dropped their investigation, marking the allegation by the anonymous caller as "unfounded," the plaintiffs filed suit.

Soon after this action was begun, the defendants moved to disqualify plaintiffs' counsel from acting as attorney for the children, arguing that a conflict or potential conflict existed between the McDonald parents and the children. Magistrate Judge Joan M. Azrack agreed that there was a potential conflict between the McDonald parents' interest in maintaining their innocence of the abuse charges and the children's interest in reporting any abuse that might in fact have occurred. Therefore, while she denied the disqualification motion, the magistrate ordered that a guardian ad litem be appointed to prepare the children for, and represent them at, their depositions. The plaintiffs appealed that order to the district court (Edward R. Korman, *Judge*).

Sensitive to the all of the interests at stake, including that of the McDonald parents in choosing counsel for their children -- particularly at "formal stages" of the case -- Judge Korman modified and narrowed Magistrate Judge Azrack's order. *See McDonald v. Hammons,* 936 F. Supp. 86, 88-89 (E.D.N.Y. 1996). The amended order specified that a guardian ad litem should be appointed "to meet and speak with the children, together with appropriate assistance and inquiry from the Magistrate Judge," to assist the court in determining the extent of any actual or potential conflict that

might exist between the parents and the children. *Id.* at 88. Judge Korman left it to the discretion of the magistrate judge to decide (in the first instance) how to proceed after that inquiry.

Acting on Judge Korman's order, the magistrate judge appointed a guardian ad litem, and the plaintiffs appealed that appointment to Judge Gershon, to whom the case had been reassigned. Judge Gershon denied the appeal, holding that the plaintiffs were eesentially trying to relitigate the issues already decided by Judge Korman. They now appeal both Judge Korman's and Judge Gershon's orders, arguing, *inter alia*: that the appointment of the guardian ad litem unconstitutionally intruded upon the familial rights of both parents and children; that the magistrate judge's questioning of the children in the presence of the guardian ad litem (which Judge Korman's order suggests) would infringe the children's right to counsel; and that this inquiry would also violate the parents' right not to have the other parties to the litigation engage in *ex parte* contacts with the magistrate Judge.

II. Discussion

The plaintiffs' appeal is at most tantamount to an appeal of an order partially disqualifying their attorney from representing them and their children at the same time (the guardian ad litem was appointed in response to the defendants' motion to disqualify. *See id.* at 87.). Or, given the very limited nature of the appointment, it can also be viewed as one step in the district court's consideration of disqualification. As such, neither Judge Korman's nor Judge Gershon's order is a final order subject to interlocutory appeal.

Plaintiffs argue, to the contrary, that the orders are collateral, and therefore appealable, pursuant to *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Appealable collateral orders are those "that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers County Comm'n,* 115 S. Ct. 1203, 1208 (1995).

The Supreme Court has held that orders disqualifying counsel in civil cases and orders denying motions to disqualify counsel are not collateral (and therefore not subject to interlocutory appeal). In doing this, the High Court noted that the propriety of granting or denying a disqualification motion frequently only becomes clear at the conclusion of the underlying litigation. *See Richardson-Merrell Inc. v. Koller,* 472 U.S. 424, 440 (1985); *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 377 (1981). Because the temporary appointment of the guardian ad litem to determine whether a conflict of interest exists between the McDonald parents and the children was ether no more than a partial disqualification, or else a part of the district court's inquiry into whether disqualification was warranted, it is likewise unreviewable at this time. The plaintiffs will have ample opportunity, after a final judgment in their § 1983 action has been rendered, to appeal any and all claims that their rights were violated by the appointment of the guardian ad litem.

The appeal is dismissed for want of jurisdiction.

FOR THE COURT:
GEORGE LANGE III, Clerk

by: [Signature: Lucille Carr]

Supreme Court, U.S.
FILED
MAR 11 1998
OFFICE OF THE CLERK

No. 97-1300

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

WILLIAM CASEY MCDONALD AND **STEPHANIE MCDONALD**, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, ET AL.,

Petitioners,

- against -

MARVA HAMMONS, INDIVIDUALLY AND AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Did the United Stated Court of Appeals for the Second Circuit correctly dismiss an appeal as not appealable under 28 USC § 1291 of an interlocutory order appointing a limited purpose guardian ad litem to question minor children who plaintiff parents had also made plaintiffs in an action under 42 USC § 1983 seeking money damages for an investigation into alleged neglect or abuse of the children by the parents? The guardian ad litem was to report to the District Court as to whether there was a potential conflict of interest between the parents and the children so that each should be represented by separate counsel, as sought by motion of defendants.

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CITY RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER STATEMENT OF THE CASE

Petitioners commenced an action under 42 USC § 1983 seeking money damages for an investigation of alleged child abuse or neglect by plaintiff parents of plaintiff minor children. Ruling on a motion by defendants to disqualify counsel from representing both the parents and the four minor children, whose ages ranged from 10 to 2 at the time of the filing of the complaint (JA12)[1], the District Court for the Eastern District of New York (Korman, J.), in a reported opinion, 936 F.Supp. 86. (A 6-12), dated September 11, 1996, modified an order made on June 20, 1996 of the Magistrate Judge, Joan Azrack, directing that a guardian ad litem be appointed to prepare the children for depositions, and depending on the evidence at the depositions, the Court would then further consider whether potential conflict between parents and children warranted each having separate counsel. The District Court judge ruled that a guardian ad litem should be appointed for the limited purposes of questioning minor plaintiff children to determine if their interests potentially conflict with the interests of the plaintiff parents.

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[1] Numbers in parentheses preceded by the letters JA refer to page numbers of the Joint Appendix before the Second Circuit. Numbers in parentheses preceded by the letter A refer to page numbers of the Appendix of the Petition for Certiorari before this Court.

By Summary Order, filed November 10, 1997 (A17-21), the United States Court of Appeals for the Second Circuit dismissed an appeal of the Order of the District Court for want of jurisdiction, as the District Court's order was not a final order subject to appeal or a collateral order appealable pursuant to Cohen v. Beneficial Indus. Loan. Corp., 337 U.S. 541 546 (1949).

MEMORANDUM AND ORDER OF THE DISTRICT COURT

The Memorandum of the District Court sets forth the operative facts. On September 23, 1994, an anonymous phone call was received at the New York City Emergency Children's Services Unit, with the caller alleging that the McDonald children suffered from poor hygiene, two children had bruises, and the mother had been seen hitting one of them. In accordance with New York State and City laws requiring that investigations into allegations of child abuse commence within twenty-four hours of a report, see New York Social Services Law § 424(6), 18 NYCRR 432.2(b)(3)(i), two caseworkers went to plaintiffs' apartment. Mr. McDonald refused to admit the caseworkers to the apartment. The caseworkers summoned police assistance, and eventually Mr. McDonald brought the children to the lobby, permitting the caseworkers to observe them, but did not allow the children to answer any questions, and continued to deny access to the family's apartment. Two days later, when a different caseworker and supervisor sought to continue the investigation and enter the apartment, Mrs. McDonald fled the building with the children and remained in hiding for about a week until this action was commenced, and the parties stipulated that defendants would take no further action with respect to the reported abuse without advance notice to plaintiffs (A6-7).

On the basis of these allegations, plaintiffs claimed a loss of privacy, liberty, fatherly care, and that they suffered "extreme humiliation, pain and suffering, terror, mental anguish and depression" (A8, Memorandum and Order of September 11, 1996, quoting Second Amended

Complaint, par. 74). Plaintiffs sought $5 million, plus punitive damages, attorney fees, and injunctive relief.[2]

As did the Magistrate Judge, the District Court Judge found there was a potential for conflict between the interest of the parents and children. For example, the parents might attempt to influence the children to testify falsely at their respective depositions (A8). The District Court pointed out that a potential conflict of interest existed because "the children are being represented by counsel selected and retained by their parents in a case in which the parents' treatment of their children provides the central backdrop. If the children confided in their attorneys that they had been abused, neglected, or otherwise mistreated, their obligation to effectively represent the interest of the children, not to speak of the obligation to ensure that the children testify truthfully, would require them to advise the children to disclose the abuse, or to take steps to permit disclosure, in order to protect the children from further abuse. This course of action by the attorneys would conflict with the interest of the parents who retained them. Moreover, aside from the potential conflict, if the children have been abused they may not feel comfortable discussing it openly with counsel retained by their parents." (A9).

The District Court held that the potential for conflict existed, and potential conflict was sufficient to warrant judicial action, citing extensively to the ABA Model Code

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[2] The injunctive relief sought for plaintiff and a putative class would require, inter alia, that all child abuse or neglect investigators have a warrant and probable cause to enter plaintiffs' apartment or the apartment of a putative class member (JA25).

of Professional Responsibility, Ethical Consideration (EC) 5-15; stating that where a lawyer is requested to represent multiple clients having potentially differing interests, the lawyer should resolve all doubts against the propriety of the representation (A9-10).

The children were not competent to waive the potential conflict, nor could the parents waive the conflict for them (A10). The District Court stated that "federal courts 'have repeatedly affirmed a court's power to determine that the interests of a child or incompetent will be best represented by a 'next friend', or guardian ad litem and not by an authorized representative such as a parent or general guardian.' Ad Hoc Comm. of Concerned Teachers v. Greenburgh #11 Union Free Sch. Dist., 873 F.2d 25, 30 (2d Cir. 1989); see also Hoffert v. General Motors Corp., 656 F.2d 161, 164 (5th Cir. 1981), *cert. denied*, 456 U.S. 961 (1982). Appointment of a guardian for an infant is justified when a parent 'is unable, unwilling or refuses to act, or has interests which conflict with that of the infant.' Ad Hoc Comm. of Concerned Teachers, 873 F.2d at 30 (emphasis added)." (A10-11).

Modifying the Magistrate Judge's ruling that the guardian ad litem should be appointed to prepare the children for the depositions and to represent them at the depositions, Judge Korman stated (A11):

> ...the better approach would be to separate the conflict determination from the substance of the litigation. The appointment by Magistrate Judge Azrack of a guardian who would have an opportunity to meet and speak with the children, together with appropriate assistance

> and inquiry from the Magistrate Judge, may address the concerns voiced by her without interfering with the parents' choice of counsel at the formal stages of a case in which there may not be persuasive evidence of neglect or abuse.
>
> Because it is not possible to foresee what the result of the foregoing procedure will be, it is neither necessary or appropriate to propose contingent courses of action that the Magistrate Judge may wish to follow. Nevertheless, I do not intend to suggest that she would be precluded from adhering to her original decision if the record provides a basis for concluding that the children should be separately represented at the deposition. Before such action is taken at the behest of the defendants, less intrusive measures should be pursued.

Various implementing orders followed. By Order dated November 25, 1996, Magistrate Judge Azrack appointed Bonnie Rabin, Esq. as guardian ad litem for the minor plaintiffs for purposes of conducting an inquiry into whether the minor plaintiffs require legal counsel separate from the attorney who represents their parents (A14).

By Order dated March 18, 1997 (A15-16), District Judge Gershon, to whom the case had been reassigned, rejected plaintiffs' appeal of the Magistrate Judge's Order of November 25, 1996, because the plaintiffs' appeal "is merely an effort to relitigate before me an issue upon which Judge Korman has already ruled, i.e., whether a guardian

ad litem should be appointed in this action. The November 25, 1996 order does nothing but carry out Judge Korman's ruling on that issue by appointing Ms. Rabin as guardian ad litem. The plaintiffs do not make any argument here as to Ms. Rabin's capacity to fulfill the role of guardian ad litem; they only seek to have me reconsider their arguments that no guardian ad litem be appointed in this action. Accordingly, I hereby affirm Magistrate Judge Azrack's order of November 25, 1996." (A15).

SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In a Summary Order, filed November 10, 1997, the Second Circuit dismissed the appeal for want of jurisdiction, stating (A20-21):

> The plaintiffs' appeal is at most tantamount to an appeal of an order partially disqualifying their attorney from representing them and their children at the same time (the guardian ad litem was appointed in response to the defendants' motion to disqualify. *See id.* [936 F.Supp.] at 87.) Or, given the very limited nature of the appointment, it can also be viewed as one step in the district court's consideration of disqualification. As such, neither Judge Korman's nor Judge Gershon's order is a final order subject to interlocutory appeal.
>
> Plaintiffs argue, to the contrary, that the orders are collateral, and therefore

appealable, pursuant to *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Appealable collateral orders are those "that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers County Comm'n,* 115 S.Ct. 1203, 1208 (1995).

The Supreme Court has held that orders disqualifying counsel in civil cases and orders denying motions to disqualify counsel are not collateral (and therefore not subject to interlocutory appeal). In doing this, the High Court noted that the propriety of granting or denying a disqualification motion frequently only becomes clear at the conclusion of the underlying litigation. *See Richardson-Merrell Inc. v. Koller,*, 472 U.S. 424, 440 (1985); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981). Because the temporary appointment of the guardian ad litem to determine whether a conflict of interest exists between the McDonald parents and the children was either no more than a partial disqualification, or else a part of the district court's inquiry into whether disqualification was warranted, it is likewise unreviewable at this time. The plaintiffs will have ample opportunity, after a final judgment in this § 1983 action has been rendered, to appeal any and all claims that

their rights were violated by the appointment of the guardian ad litem.

REASONS FOR DENYING THE WRIT

The United States Court of Appeals for the Second Circuit correctly dismissed the appeal for want of jurisdiction. The appeal concerned only the appointment of a guardian ad litem for the limited purpose of questioning the plaintiff children prior to their depositions to determine if there is potential conflict between the interests of the children and their parents such as to warrant disqualification of Lansner & Kubitschek as joint counsel for both the parents and children and the appointment of a guardian ad litem for the children to serve throughout the proceedings. The challenged order appointing a guardian ad litem for limited purposes obviously did not finally determine the case so as to be appealable under 28 U.S.C. § 1291, as the order did not end the litigation on the merits and leave nothing for the Court to do but execute the judgment. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1988). The District Court had not certified an interlocutory appeal under 28 U.S.C. § 1292(b), and the District Court had no legal basis to, was not asked to, and did not, certify an appeal under Rule 54. Plaintiffs have not requested any certification of an appeal by the District Court.

The order appointing a guardian ad litem for limited purposes was not an appealable collateral order which should be treated as final under a "practical construction" of 28 U.S.C. § 1291 pursuant to the Cohen doctrine (Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. 541). See Digital Equipment Corp. v. Desktop Direct, Inc., 511

U.S. 863, 867 (1994). To be an appealable collateral order under 28 U.S.C. § 1291 pursuant to the Cohen doctrine, which is a narrow exception to statutory finality appealability requirements, the order must at a minimum satisfy three conditions: it must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action and be effectively unreviewable on appeal from a final judgment. Swint v. Chambers County Commission, supra, 115 S.Ct. at 1208; Digital Equipment Corp. v. Desktop Direct, Inc., supra, 511 U.S. at 867; Gulfstream Aerospace Corp. v. Mayacamas Corp., supra, 485 U.S. 271, 276; Richardson-Merrell Inc. v. Koller, supra, 472 U.S. at 431-432. The question sought to be reviewed must involve rights too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. at 546; Richardson-Merrell Inc. v. Koller, supra, 472 U.S. at 430.

To the extent plaintiffs-appellants challenge the orders as constricting their right to counsel of their choice, appealability is precluded under Richardson-Merrell Inc. v. Koller, supra, 472 U.S. 424, where it was held that an order disqualifying counsel in a civil case was not appealable as a collateral order under the Cohen doctrine. Such an order was not completely separate from the merits and was not unreviewable on appeal from the final judgment, citing, inter alia, Flanagan v. United States, 465 U.S. 259 (1984), holding that disqualification of counsel in a criminal case was not immediately appealable and could be adequately reviewed on appeal of a final judgment. An order disqualifying counsel in a civil case is usually entwined with the merits of the litigation. Richardson-

Merrell, Inc. v. Koller, supra, 472 U.S. at 439. The disqualified attorney's interest in immediate vindication is not one that necessarily coincides with the interests of the client. Furthermore, review under the 28 U.S.C. § 1292(b) certification procedure may be available to the client, who can also raise the issue of disqualification on appeal from an unsatisfactory final judgment. Id. 472 U.S. at 435. To allow such an interlocutory appeal would undermine the statutory preference for a single appeal, raising all issues following final judgment on the merits rather than resorting to piecemeal appellate review. That final judgment rule, generally requiring that appeals be from final judgments, "promotes efficient judicial administration while at the same time emphasizing the deference appellate courts owe to the district judge's decisions on the many questions of law and fact that arise before judgment.(citation omitted) Immediate review of every trial court ruling, while permitting prompt correction of erroneous decisions, would impose unreasonable disruption, delay and expense. It would also undermine the ability of district judges to supervise litigation." Id., 472 U.S. at 430.

The plaintiff parents' claims that the order infringes on their parental rights also has no bearing on the appealability of the orders. Under the Cohen doctrine, a collateral order is appealable only if it conclusively determines the disputed issue which is separate from the merits. Swint v. Chambers County Commission, supra, 115 S.Ct. at 1208: an order denying summary judgment to a government entity on the ground that a particular employee whose actions were challenged may have been a final policy maker capable of binding the government entity under Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), which ruling the District Court

indicated would be reconsidered prior to submission of the case to the jury, was tentative, informal and incomplete, and was not subject to interlocutory, collateral appeal; Gulfstream Aerospace Corp. v. Mayacamas Corp., supra, 485 U.S. at 277-278: denial of an abstention motion was not subject to interlocutory appeal. The order did not conclusively determine the question of whether abstention was warranted based on the existence of an ongoing parallel state court proceeding, since the court's view could change as the two proceedings progressed.

The instant orders did not even appoint a guardian ad litem for the children for all further proceedings or disqualify the firm of Lansner & Kubitschek from representation of either the children or the parents. The orders simply appointed a guardian ad litem to question the children to determine if there was significant potential for a conflict of interest between the parents and children so that the children should have separate counsel, a guardian ad litem for all purposes in the proceeding, or both. Only if one accepts the parents' unreasonable position that the mere appointment of a guardian ad litem simply to question the children is a major infringement of their parental rights can these orders be regarded as conclusively determining any issue.

The District Court's order appointing a guardian ad litem for the limited purpose of questioning the minor children to determine if there was a potential conflict between the interests of the parents and children was not "big brother interference", nor is "Petitioners' wish to keep bureaucratic interference out of Petitioners' home". (Petition for Writ of Certiorari, p. 7), even rationally involved here. The District Court's order has no bearing

on the upbringing of petitioners' children, but is designed to regulate proceedings before the Court in an action for money damages and injunctive relief initiated by the plaintiff parents. The District Court's order appointing a guardian ad litem to question the children to determine if there was a potential for conflict between their interests and their parents' interests was authorized under Rule 17(c) Fed.R.Civ.P., and was an appropriate discretionary act under these circumstances. The courts have consistently recognized that they have inherent power to appoint a guardian ad litem under Rule 17(c) Fed.R.Civ.P. when it appears that the minor's general representative has interests which may conflict with those of the person he is supposed to represent. For example, the court could appoint a guardian ad litem for a minor child when a question of how to apportion settlement proceeds of a car accident in which both parent and child were injured created a potential conflict of interest. Hoffert v. General Motors Corp., supra, 656 F.2d at 164. In a case where a minor sued claiming a right to obtain contraceptives without parental consent, there was a potential conflict between the interests of the parents and the child, and the parents could not serve as guardians ad litem in such litigation. M.S. v. Wermers, 557 F.2d 170, 175 (8th Cir. 1977); Accord: Noe v. True, 507 F.2d 9 (6th Cir. 1974). Rule 17(c), which is permissive and not mandatory, gives a federal court the power to authorize someone other than a lawful representative to sue on behalf of an infant or incompetent person where that representative is unable, unwilling or refuses to act or has interests which conflict with those of the infant. Ad Hoc Committee of Concerned Teachers v. Greenburgh No. 11 Union Free School District, supra, 873 F.2d at 29, citing 6 C. Wright & A. Miller, *Federal Practice and Procedure*: *Civil* § 1570; 3A J. Moore & J.

Lucas, *Moore's Federal Practice*, § 17.26 (2d Ed. 1987). Furthermore, a decision by a District Court to appoint a guardian ad litem can be reversed on appeal only if the appointment constituted an abuse of discretion. Gardner v. Parson, 874 F.2d 131, 140 (3d Cir. 1989); Hoffert v. General Motors Corp., supra, 656 F.2d at 164.

Rule 17(c) flows from the general duty of the court to protect the interests of infants and incompetents in cases before the court. Garrick v. Weaver, 888 F.2d 687, 693 (10th Cir. 1989). "[W]hen the complaint shows a conflict of interest between a general guardian and an infant the Court should, *on its own motion*, determine whether the infant's interests are adequately protected by the general guardian's representation." Chrissy F. v. Mississippi Department of Public Welfare, 883 F.2d 25, 27 (5th Cir. 1989), citing Adelman v. Graves, 747 F.2d 986, 988 (5th Cir. 1984). A guardian ad litem assists the court in carrying out that mission. As stated in Dupont v. Southern National Bank of Texas, 771 F.2d 874, 882 (5th Cir. 1985) *cert. den.* 474 U.S. 1085 (1988):

> The roles of a guardian ad litem and an attorney ad litem differ, and we must consider each separately. A guardian ad litem is, in a sense, an officer of the court. "[He] is not simply counsel to one party in the litigation, but instead plays a hybrid role, advising one or more parties as well as the court." *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 854 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982); (citations omitted). As one court explained, "[T]he infant is always the ward of every court

> wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done him. The guardian ad litem is appointed merely to aid and to enable the court to perform that duty of protection." *Richardson v. Tyson,* 110 Wis. 572, 86 N.W. 250, 251 (1901), *quoted in Friends for All Children,* 725 F.2d at 1400. An attorney ad litem, in contrast, serves no special function. He performs the same services as any attorney--giving advice, doing research, and conducting litigation--only for a minor child rather than for an adult.

Appointment of a guardian ad litem, simply to question the children, simply to assist the court in determining whether a potential conflict existed between the children and their parents, was certainly warranted when the underlying allegations of the complaint concerned the right to investigate a complaint that the parents abused or neglected the children. See Gardner v. Parson, supra, 874 F.2d at 139; Chrissy F. v. Mississippi Department of Public Welfare, supra, 883 F.2d at 27; Smith v. Organization of Foster Families, 431 U.S. 816, 841 n. 44 (1976): In a case challenging the constitutionality of procedures for terminating foster care placements with particular foster parents, "the District Court properly appointed independent counsel to represent the foster children so that the court could have the benefit of an independent advocate for the welfare of the children, unprejudiced by the possibly conflicting interests and desires of the other parties."

In this case, the District Court appropriately recognized its responsibility to protect infants before the court to determine that no injustice is done to them, as would occur if the parents recovered money damages because an investigation into the welfare of the children was conducted when that investigation was warranted. The parents would be rewarded for inappropriately resisting appropriate efforts to assist the children and indeed would only be encouraged to further mistreat them. The District Court appropriately rejected the unconscionable argument in opposition to the appointment that merely because the investigation into child abuse and neglect had been concluded, the only issue was an entitlement to money damages. It is the legal entitlement to conduct the investigation which is at issue, not the outcome; furthermore, the District Court even noted that the record before the court supported an inference that the investigation may have been prematurely and inadequately concluded because of undue solicitousness to the parents' complaints about the investigation. There is an obvious possibility of conflict in a suit in which children join their parents as plaintiffs challenging at least the implementation of statutory procedures to protect children from mistreatment by their parents. In addition, the plaintiffs purport to be representatives of classes of parents and children similarly affected by such child protection laws (JA 15). The District Court certainly was warranted in questioning whether potential conflict existed between the instant plaintiff parents and children.[3]

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[3] Even when the Sixth Amendment right to counsel in a criminal proceeding is involved, the right to counsel of one's choice is not unlimited. There is no absolute right to

(continued...)

The District Court also correctly rejected the argument that it could be assumed that counsel chosen by the plaintiff parents would adequately protect the rights of the plaintiff minor children. There was obviously a potential conflict involved in the multiple representation of the parents and children, who had potentially conflicting interests, see Dunton v. County of Suffolk, 729 F.2d 903, 908-909 (2d Cir. 1984) mod. other grs. 748 F.2d 69 (1984) citing, at 729 F.2d 908, Canons 5 and 9 of the ABA Code of Professional Responsibility, and Ethical Consideration (EC) 5-15, particularly since the conflict could not be effectively explained to, nor waived by, these young, minor children. As stated in Fargnoli v. Faber, 105 AD2d 523, 524 (3rd Dept. 1984) *appeal dismissed* 65 NY2d 631 (1985), where a parent and children have possibly conflicting interests in litigation, "[p]arents may not ...

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[3] (...continued)
joint representation which creates a possible conflict of interest, because the courts have an important interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. Wheat v. United States, 486 U.S. 153, 160 (1988). Of course, in this case, the District Court has not even disqualified counsel or appointed a guardian ad litem for all purposes in the proceeding, but has merely appointed a guardian ad litem for the limited purpose of questioning the children to determine if there is a potential conflict of interest between the parents and the children. There was no final determination as to whether a full purpose guardian ad litem should be appointed or as to whether counsel should be disqualified, thus there is no final determination by the District Court which is appealable even as a collateral order.

retain counsel for their children or become involved in the representation of their children because of the appearance or possibility of a conflict of interest or the likelihood that such interference will prevent the children's representation from being truly independent."

The very limited order of the District Court did not raise an important question of law, a prerequisite for collateral order review. See Banque Nordeurope v. Banker, 970 F.2d 1129, 1131-1132 (2d Cir. 1992). Shakur v. Malcolm, 525 F.2d 1144, 1147-1148 (2d Cir. 1975). The orders appointing a guardian ad litem merely to interview the children to determine potential for conflict between the interests of plaintiff parents and children, with further court action to abide by that determination, are unappealable interlocutory orders concerning the manner of conducting the litigation, best left to the unreviewable discretion of the district court. See Cullen v. New York State Civil Service Commission, 566 F.2d 846, 848 (2d Cir. 1979); Weight Watchers of Philadelphia, Inc. v. Weight Watchers International Inc., 455 F.2d 770, 774 (2d Cir. 1972). The Second Circuit correctly dismissed this appeal, and the petition for a writ of certiorari should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: March 9, 1998
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Respectfully submitted,

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